No. 13-18-244-CR

IN THE COURT OF APPEALS
FOR THE THIRTEENTH DISTRICT OF TEXAS
AT CORPUS CHRISTI

THE STATE OF TEXAS,
APPELLANT

v.

SHEILA JO HARDIN,
APPELLEE.

ON APPEAL FROM THE 319TH DISTRICT COURT
NUECES COUNTY, TEXAS

APPELLANT'S BRIEF
(STATE'S APPEAL)

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ORAL ARGUMENT IS REQUESTED

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NO. 13-18-244-CR

THE STATE OF TEXAS, Appellant,	§ § §	COURT OF APPEALS
V.	§	FOR THE THIRTEENTH
SHEILA JO HARDIN, Appellee.	§ §	DISTRICT OF TEXAS

APPELLANT'S BRIEF
(STATE'S APPEAL)

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Sheila Jo Hardin was charged by indictment with the felony offenses of Fraud and Forgery. (CR p. 5) She filed a motion to suppress based on lack of reasonable suspicion to conduct the traffic stop during which evidence of the offenses in question was found (CR p. 40), which the court granted on February 22, 2018. (CR p.44). The State filed a timely notice of appeal from this order on February 23, 2018 (CR p. 51), and a timely request for findings of fact and conclusions of law (CR p. 53). The trial court recently signed findings and conclusions which the State expects to be filed soon in a supplemental clerk's record.

ISSUE PRESENTED

Ground of Error

The trial court erred by granting Hardin's motion to suppress, and specifically, in concluding that Officer David Alfaro lacked reasonable suspicion to stop Hardin for failing to maintain a single lane.

STATEMENT OF FACTS

At the suppression hearing, the defense challenged only the lack of reasonable suspicion for the stop. (RR vol. 2, pp. 4-5).

Corpus Christi Police Officer David Alfaro, the only witness at the hearing, testified that he on April 23, 2017, he conducted a traffic stop on a vehicle (later identified as Ms. Hardin's vehicle (RR vol. 2, p. 10)) for failing to maintain a single lane of travel. (RR vol. 2, p. 5-6). Specifically, Officer Alfaro observe Hardin's vehicle's tires cross the white line and ride for a couple seconds on the other side of the lane. (RR vol. 2, p. 9) The State later played a recording of the traffic violation (RR vol. 2, p. 16), which was later admitted into evidence as SX # 1. (RR vol. 2, pp. 20-21)

SUMMARY OF THE ARGUMENT

Failure to maintain a single lane, whether or not it can be done safely, is a traffic violation which in itself provided reasonable suspicion for Officer Alfaro to stop Hardin.

ARGUMENT

Ground of Error

The trial court erred by granting Hardin's motion to suppress, and specifically, in concluding that Officer David Alfaro lacked reasonable suspicion to stop Hardin for failing to maintain a single lane.

I. Appellate Jurisdiction.

The State is entitled to appeal an order of the trial court granting a defendant's motion to suppress. TEX. CODE CRIM. PROC. ART. 44.01 (a)(5).

II. Appellate Standard of Review.

A trial court's ruling on a motion to suppress evidence is reviewed on appeal under a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). Almost total deference is accorded to a trial court's determination of the facts that the record supports. *Id*. When applying the law to the facts, appellate courts review the trial court's ruling *de novo*. *Id*. When the trial court makes findings of fact, the reviewing court should give almost total deference to its determination of the historical facts that are supported by the record, but such deference is given "only if the trial court's rulings are supported by the record." *Miller v. State*, 393 S.W.3d 255, 262–63 (Tex. Crim. App. 2012).

III. Reasonable Suspicion to Stop.

Reasonable suspicion for a temporary detention exists if, after looking at the totality of the circumstances, the detaining officer has specific, articulable facts combined with rational inferences from those facts, which lead him to conclude that the detained person is, or has been engaged in criminal activity. *Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997). This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists. *Ford v. State,* S.W.3d 488, 492-93 (Tex. Crim. App. 2005).

IV. Failure to Maintain a Single Lane of Travel.

The Transportation Code requires that an operator on a roadway divided into two or more clearly marked lanes for traffic:

> (1) shall drive as nearly as practical entirely within a single lane; and
> (2) may not move from the lane unless that movement can be made safely.

Tex. Transp. Code § 545.060 (a).

A recent plurality opinion of the Texas Court of Criminal Appeals has interpreted Section 545.060 (a) to require an operator to comply with both subsections (1) and (2), such that he must "drive as nearly as practical entirely within a single lane," whether or not movement between lanes may

be made safely. *Leming v.State*. 493 S.W.3d 552, 559-60 (Tex. Crim. App. 2016) (Part II of the *Leming* opinion gained only four votes and is a plurality opinion). The court further explained that failing to stay entirely within a single lane is not an offense if it is prudent to deviate to some degree to avoid colliding with an unexpected fallen branch or a cyclist who has strayed from his bike lane. *Id*.

Although plurality opinions do not constitute binding authority, they "may nevertheless be considered for any persuasive value they might have." *Unkart v. State,* 400 S.W.3d 94, 100–01 (Tex. Crim. App. 2013). The State would suggest that the reasoning of the plurality in *Leming* is persuasive. Moreover, the deciding vote on the Court of Criminal Appeals did not clearly disagree with this reasoning, but rather accepted the alternative ground, discussed below, which also found justification for the stop based on suspicion of DWI.

Although this Court in *State v. Cerny*, 28 S.W.3d 796, 801 (Tex. App.—Corpus Christi 2000, no pet.), summarily agreed with the reasoning in *Hernandez v. State,* 983 S.W.2d 867 (Tex. App.–Austin 1998, pet. ref'd), to the effect that weaving is not unlawful unless unsafe, this Court did not have the benefit of the reasoning in the plurality opinion in *Leming*. Moreover, according to its own terms, *Cerny* was limited to situations in

which the driver is “weaving somewhat within his own lane of traffic,” such that it is arguable that the Thirteenth Court of Appeals has not yet addressed the legality of stopping a driver for weaving outside his lane.

Moreover, in addition to the reasons set forth in *Leming*, the State would suggest as well the following reasons for interpreting Section 545.060 (a) to require a driver to avoid swerving into or over lane markers, regardless of whether such swerving may be done safely under the circumstances.

In construing a statute, a Court may consider among other matters the: (1) object sought to be attained; and (5) the consequences of a particular construction. Tex. Gov't Code § 311.023. In addition, the Court should presume that the Legislature intended for the entire statutory scheme to be effective. *See* Tex. Gov't Code § 311.021(2); *Leming v. State*, 493 S.W.3d 552, 559 (Tex. Crim. App. 2016) (Plurality Opinion); *Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012). To that end, under the doctrine of *in pari materia*, while all parts of a statutory scheme on the same or similar subject should be given effect and construed in harmony with each other, in the event of an irreconcilable conflict a more specific provision should prevail over a more general one. *See* Tex. Gov't Code § 311.026; *Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988); *State v.*

Schunior, 467 S.W.3d 79, 83 (Tex. App.—San Antonio 2015), *aff'd*, 506 S.W.3d 29 (Tex. Crim. App. 2016).

A common sense reading of the present statute, and one consistent with the doctrine of *in pari materia*, would interpret Subsection (a)(1) to apply generally, and without any safe-movement exception, to all driving within a lane that does not involve changing or entirely leaving the lane in question, while Subsection (a)(2) and the safety and related signaling requirement [1] apply only to lane changes or leaving the lane entirely.

Specifically, the requirement in Subsection (a)(2) that a driver "may not move from the lane unless that movement can be made safely," should be read to apply only to changing or fully leaving the lane in question, not to merely swerving into or over the lane markers.

The State acknowledges that, whether "move from the lane" means entirely moving out of the lane and into another lane, shoulder, off-ramp, or adjacent area, or merely moving any part of the vehicle outside, across, or into the white lines dividing lanes is not entirely clear from the terms used in the statute. In the context of burglary and criminal trespass, a similar ambiguity concerning whether "enter" means a partial or entire intrusion of

[1] *See* Tex. Transp. Code § 545.104 (a) ("An operator shall use the signal authorized by Section 545.106 to indicate an intention to turn, change lanes, or start from a parked position.").

the body onto the property of another has been resolved by definitions specifically requiring partial intrusion for burglary, Tex. Penal Code § 30.02 (b), but intrusion of the entire body for criminal trespass. Tex. Penal Code § 30.05 (b)(1). No such definition is provided in the Transportation Code for "move from the lane," and the ambiguity remains concerning whether the phrase requires movement of the entire vehicle out of the lane in question, or merely movement of any part of the vehicle into or across the dividing lines.

However, common sense and the statutory scheme clearly suggest that Subsection (a)(2) should apply only to the equivalent of a lane change.

If taken literally and applying both subsections to the same driving behavior, the statute would suggest that a driver may never move from his lane unless both (1) it is impractical to stay in his lane for some reason *and* (2) movement from the lane can be made safely. But, this begs the question of when it would become impractical to remain in a single lane. Surely, when the driver wishes to change lanes, it may still be "practical" for him to remain in the lane of travel, but does this mean that he may never change lanes until some circumstance actually requires him to do so? (*e.g.*, when he is in danger of running out of gas or the lane itself ends or merges)? This would be an absurd reading of the statute. A common sense reading, however, suggests that the requirement to drive within a single lane applies

to the more general behavior of driving down the highway when no lane change is intended, while the separate requirements for safe movement from the lane and signaling apply to the more specific behavior of turning into another lane or portion of the highway.

In addition, drivers who are changing lanes might be expected to determine beforehand whether the lane change will be safe. However, drivers swerve between lanes because they are not being careful and attentive in the first place. There is no logical reason to encourage this behavior and it would be absurd to ascribe a statutory intent to allow drivers to be careless and swerve between lanes, but only so long as they do so safely. The prior version of the statute is illuminating in this regard, as it provided that "The driver of a vehicle shall drive as nearly as practical entirely within a single lane and shall not be moved from one such lane *until the driver has first ascertained that such a movement can be made with safety*." Tex. Rev. Civ. Stat. Article 6701d, § 60(a); Acts1947, 50th Leg., ch. 421, § 60, p. 978 ("Uniform Act Regulating Traffic on Highways") (emphasis added). Common sense suggests that swerving within and between lanes is not planned driving behavior and it would be absurd to suggest that a driver may swerve in this manner if he has "first ascertained that such a movement can be made safely." Changing lanes, on the other

hand, is exactly the sort of planned behavior to which this portion of the statute logically applies.

Finally, the object sought to be obtained is the safe movement of traffic, but the majority of the rules of the road do not allow for subjective determinations about safe movement. The requirements that a driver stop at a stop sign or red light make no provision for disregarding those devices even if the driver determines it can be done safely. Likewise, lines are painted to divide the lanes for a purpose, and drivers are expected to abide by those lanes as best they can, and not to disregard them simply because they think it can be done safely. The opposing construction would turn the lane markings into little more than suggestions rather than directives. Moreover, the requirement for signaling an intention to change lanes would also be rendered largely meaningless if a driver could swerve back and forth across lanes without signaling.

For all of these reasons, the Subsection (a)(1) requirement for an operator to drive as nearly as practical entirely within a single lane should not be read as subject to a Subsection (a)(2) safe movement exception in the absence of a complete and properly signaled lane change.

V. Application.

In the present case, Officer Alfaro's testimony and the video recording show that the tires on Hardin's vehicle strayed outside her lane without any indication that Hardin was then initiating a lane change, such that Officer Alfaro had reasonable suspicion to initiate a traffic stop for the offense of failure to maintain a single lane of travel, regardless of whether the movement in question was unsafe. In addition, SX # 1 shows that there was no apparent reason Hardin needed to swerve out of her own lane, such as an object in the road or another vehicle swerving towards her. Her swerving was purposeless and amounted to a violation of section 545.060 of the Transportation Code.

For this reason, Officer Alfaro had reasonable suspicion to stop Hardin for a traffic violation, and the trial court erred in granting the motion to suppress.

PRAYER

For the foregoing reasons, the State respectfully requests that the Court of Appeals order the trial court to vacate its order granting the motion to suppress, and for all other relief to which the State shows itself justly entitled.

Respectfully Submitted,

/s/ *Douglas K. Norman*

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RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 2,175.

/s/ *Douglas K. Norman*

Douglas K. Norman

CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served on July 10, 2018, on Appellee's attorney, Mr. Donald B. Edwards, at mxlplk@swbell.net.

/s/ *Douglas K. Norman*

Douglas K. Norman